U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 08Dec2000

CASE NO.: 2000-LHC-1082

OWCP NO.: 7-124146

In the Matter of:

JOHNNY PLAISANCE, SR.,
Claimant

v.

MELANCON'S WELDING,
Employer

COMMERCIAL UNION INSURANCE CO.,
Carrier
and

BOLLINGER MACHINE SHOP & SHIPYARD, INC.,
Employer

HARTFORD INSURANCE CO.,
Carrier

APPEARANCES:

JOSEPH B. GUILBEAU
For Commercial Union Insurance Co.

TODD L. LACOSTE
For Bollinger Machine Shop & Shipyard, Inc.

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER – DENYING REIMBURSEMENT

This proceeding involves a claim for reimbursement under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"), and the regulations promulgated thereunder. This claim is brought by Commercial Union Insurance Company, Claimant, against Bollinger

Machine Shop & Shipyard, Inc., Respondent, for payments made on behalf of Melancon's Welding to John Plaisance.[1]

Melancon's Welding entered into a subcontract with Respondent to perform welding work on the M/V Gulf Lightening. John Plaisance was on the payroll of Melancon's Welding and was assigned to make repairs on this vessel. On June 20, 1991, Mr. Plaisance was injured on the M/V Gulf Lightening. Claimant, as Melancon's compensation carrier, paid benefits to Mr. Plaisance. Meanwhile, Mr. Plaisance sued both Melancon's Welding and Respondent, among other defendants, for tort damages in the United States District Court for the Eastern District of Louisiana. Claimant intervened in the suit. Respondent successfully moved for summary judgement on grounds that it was Mr. Plaisance's "borrowing employer" at all times and immune from tort liability under Section 905 of the LHWCA. Claimant, who had been making payments to Mr. Plaisance on behalf of Melancon's Welding, terminated payment of benefits to Mr. Plaisance when he entered into a settlement of the claim. On June 24, 1997, Claimant filed a Complaint of Reimbursement against Respondent with the Department of Labor.

A hearing was held in Metairie, Louisiana on August 7, 2000, at which time the parties were represented by counsel, given the opportunity to offer testimony, documentary evidence, and to make oral argument. The parties agreed to a set of stipulations at this hearing. Additionally, the following exhibits were received into evidence:

Respondent's Exhibits Nos. 1-7[2]

Upon conclusion of the hearing, the record was closed. Proposed findings of fact and conclusions of law were timely received from both parties. This decision is being rendered after having given full consideration to the entire record.[3]

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[1]John Plaisance, the injured employee, and Melancon's Welding, the direct payroll employer, are not parties to this claim. Therefore, this Court will refer to the two parties in the action, Commercial Union Insurance Company and Bollinger Machine Shop & Shipyard, respectively as "Claimant" and "Respondent."

[2]The following abbreviations will be used in citations to the record: RX - Respondent's Exhibit and TR - Transcript of the Proceedings.

[3]The Court notes that both parties prepared exhibits to be submitted. At the hearing, this Court requested that the parties avoid submitting duplicate exhibits. Since both parties relied on similar exhibits, this Court requested that only one set be entered into evidence. In addition, the reference to the exhibits

STIPULATIONS

After an evaluation of the entire record, this Court finds sufficient evidence to support the following stipulations:

1) Johnny Plaisance was the direct payroll employee of Melancon's Welding;

2) Johnny Plaisance's accident occurred on June 20, 1991, at Respondent's facility;

3) Claimant, as the compensation carrier for Melancon's Welding, paid a total of $54,890.78 under its policy to Johnny Plaisance in weekly compensation and medical benefits; and

4) At this time there are no ongoing benefits, either compensatory or medical, being paid by Claimant. TR. 5-6.

ISSUES

The unresolved issues in this proceeding are:

1) Whether Respondent is Mr. Plaisance's "borrowing employer"; and

2) Whether Claimant, Commercial Union, is entitled to reimbursement from Respondent, Bollinger Machine & Shipyard, Inc., for benefits that it paid to Mr. Plaisance.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Jack F. Young

Jack Young testified for Claimant as an expert witness. He stated he has been continuously employed in the insurance industry since 1959. He testified that he was employed by various organizations and had his own insurance agency at one point. He is currently employed by Stiel Insurance Services as an account executive. Mr. Young added that he had never worked for Commercial Union or sold any of their policies. TR. 28-29.

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as Respondent's is due to the fact that Commercial Union originally labeled its bound exhibits as "RX." Exhibits submitted into evidence can be relied on by either party, and the reference to the exhibits in this case as Respondent's is for the sake of efficiency and does not affect the weight assigned to the evidence in any way.

He testified that Stiel Insurance Services provides a full line of insurance policies to its customers, including workers' compensation, comprehensive general liability, and maritime. Mr. Young stated that, as an account executive, his duties include meeting with potential customers and determining their insurance needs. He added that part of his job is to provide the appropriate coverage as well as the endorsements needed to fit certain situations. TR. 29.

He acknowledged that he was familiar with the workers' compensation/employers' liability policy. He added that there is a standardized form for this type of policy as well as standard types of endorsements. He testified that the National Council on Compensation Insurance (NCCI) is the entity that issues and approves these standardized policies and endorsements, which are then accepted by the insurance industry. Mr. Young testified that, because of the standard form, all workers' compensation/employers' liability policies will basically look identical. He added that the only differences would be the various endorsements on the policies, which meet each company's needs. He also stated that a company cannot change the standard coverage language in the jacket of the policy. TR. 30-31.

Mr. Young stated that he had testified in court as an expert witness, primarily in the areas of workers' compensation, general liability, and maritime insurance. He stated that he has never been denied tender as an expert. He added that he has testified in state trial courts approximately five times, but never in a federal court. Mr. Young stated that he was being paid to testify in this case, however, the hourly rate was undetermined. He added that he had previously been qualified as an expert in the interpretation of insurance policies. In response to questions from Respondent's counsel, Mr. Young stated that he would consider the direct control, supplies, and location of the job as factors in determining whether or not an employer qualified as a "borrowing employer." TR. 31-36.

Mr. Young was tendered as an insurance expert with the specialty and the expertise associated with determining the necessary coverage and how to obtain this coverage under the standard workers' compensation/employers' liability policy. This Court accepted the tender of Young as an expert in insurance matters within the maritime and workers' compensation fields. TR. 37.

Mr. Young first explained that a typical workers' compensation policy is divided into three parts. The first part is the jacket. See RX-6, p. 1-9. The second part is the declarations page. See RX-6, p. 10. The final part of the policy contains the individual endorsements. Mr. Young stated that the policy language in the jacket and endorsements for a given time period will look the same, regardless of which carrier issues the workers' compensation policy. He added that the full policy for a customer is created by adding the particular endorsements desired to the standard policy. Mr. Young testified that some of these endorsements specifically mention other companies. He stated that in a waiver of subrogation endorsement, for example, there might be a specific company designated to receive the benefit of that endorsement. Mr. Young pointed out that in Claimant's policy, Respondent is specifically listed in the schedule under the endorsement entitled "Waiver of Our Right to Recover From Others" Endorsement. TR. 38-44; See RX-6 p. 24.

He testified that in a workers' compensation/employers' liability policy, unlike a comprehensive general

liability policy, a party cannot be named as an additional assured. He stated that the reason for this is that a listed company would not have an insurable interest. He added that in order to be an additional assured under a workers' compensation policy, the insured must have an ownership interest in the company seeking insurance. Mr. Young testified that in a case such as this one, Respondent could not be named as an additional insured unless it actually owned a part of Melancon's Welding. He further testified that, in a comprehensive general liability policy, various companies can be named as additional assureds even if they do not have an ownership interest. Mr. Young added that the typical way a borrowing employer gets coverage under another company's workers' compensation policy is by adding an alternate employer endorsement to the policy. He added that the workers' compensation policy in this case contains no alternate employer endorsement. He noted that the effect of adding this endorsement to this policy would be to give Respondent the benefit of insurance under the policy issued to Melancon's Welding by Claimant. Mr. Young opined that assuming Respondent is the borrowing employer, Claimant's policy does not cover Respondent without this endorsement. TR. 44-46.

Mr. Young also testified that a waiver of subrogation endorsement is not related to providing coverage under a workers' compensation policy. He stated that this endorsement, a standard request in the industry, has traditionally been used in a tort setting. Mr. Young added that when he is asked to include a waiver of subrogation in a policy by his customers, the party requesting the waiver is asking to be protected from a liability action for an injury caused by their negligence. Mr. Young referenced the language in the waiver of the standard policy as proof of his point. The clause entitled, "Recovery from Others," provides that:

> We have the right, to recover our payments from anyone liable for an injury covered by this policy. See RX-6, p. 24.

Mr. Young explained that in the insurance industry the phrase, "liable for the injury," references a tort setting. He added that the above clause, although it is entitled "Recovery from Others," is the subrogation language in the policy. Mr. Young stated that he has never seen a waiver of subrogation requested in the context of two employer entities or two compensation-payor entities arguing about which one owes the workers' compensation. He opined that in the present case, the subrogation situation came to an end when Respondent was declared the borrowing employer, and Mr. Plaisance's case against it was dismissed. At that point, any subrogation rights died with the case. TR. 46-51.

Mr. Young then testified that the primary employer's obligation to obtain workers' compensation insurance cannot be avoided. He stated that the obligation could, however, be transferred by the use of the alternate employer endorsement. He added that the primary employer could not avoid paying the premium on the insurance simply because another employer borrowed its employees. Regarding the issue of premiums, which are determined by payroll, Mr. Young testified that the premium is always based on the payroll of the direct employer. TR. 53-54.

Mr. Young testified that, in his experience, a workers' compensation policy does not provide coverage for liability assumed under a contract. He stated that this is evident from the policy itself. He referenced Section B of the compensation portion of the policy entitled, "We will Pay," which provides, "We will pay promptly when due the benefits required of you by the workers' compensation law." TR. 54; See RX-6, p.4. He stated that there is no

endorsement in a workers' compensation policy that extends the policy to cover liability assumed under a contract. Mr. Young added that the payment of compensation was an obligation by statute and not by contract. He contrasted this with the comprehensive general liability policy, which can be amended to cover contractual liability. On this basis, he concluded that Claimant's policy could not extend coverage to any company that Melancon's Welding contracted with to provide coverage. TR. 55-56.

Mr. Young testified that, even assuming that Respondent is a borrowing employer, the waiver of subrogation endorsement in the policy has no bearing in this case, because there is no tort. The subrogation clause would be relevant, however, if Mr. Plaisance had a pending suit in federal court against Respondent, and Claimant intervened. He testified that, at that point, the waiver would be effective, because Respondent would be sued as a "third party." As a result, if Respondent was dismissed from the case, Claimant's suit against them would be dismissed as well. Mr. Young stated that there is only one type of waiver of subrogation endorsement in a workers' compensation policy, and he has never heard of this endorsement being used in a situation where a compensation carrier is seeking reimbursement from another party. TR. 57-60; See RX-6, p. 24.

Mr. Young also testified about the effect that an alternate employment endorsement has on a workers' compensation policy. He initially stated that the policy issued by Claimant did not contain an alternate employment endorsement. Therefore, in his testimony, he referred to the standard NCCI alternate employment endorsement. See RX-7. He explained that the purpose of this endorsement is to make the alternate employer an insured under the policy, so that they get the benefit of the policy. It requires the carrier to pay compensation benefits owed by the alternate employer. In the event the carrier cannot pay the benefits directly to the injured party, either it or the primary employer will reimburse the alternate employer. The "alternate employer" is a broad concept that encompasses a "borrowing employer." Mr. Young stated that if this endorsement had been attached to the policy, Claimant would have been required to pay benefits on behalf of Respondent. TR. 62-64.

In Mr. Young's opinion, the waiver of subrogation endorsement has no application to the present claim for reimbursement. He testified that only the alternate employer endorsement would protect Respondent from exposure for compensation. He stated that the waiver of subrogation endorsement only provides protection from a reimbursement claim to Respondent as a third party liable for tort damages. TR. 65-67.

Mr. Young testified that the language in the alternate employer endorsement requires that the listed beneficiary be obligated to provide insurance to its direct employees – meaning those who are not borrowed from another company. He also testified that there is no additional premium charged for the alternate employer endorsement, because there is no additional payroll to be figured into the premium. He stated that if Claimant issued this endorsement in favor of Respondent and then paid benefits to the injured employee, Claimant could not seek compensation reimbursement from Respondent. He ultimately concluded that, absent the alternate employer endorsement, there is no way for the policy to provide coverage to Respondent as a borrowing employer. He also concluded that any application of the waiver of subrogation endorsement ended when Respondent was dismissed from the United States District Court civil case as the borrowing employer. TR. 65-70.

On cross-examination, Mr. Young conceded that the language of the alternate employer endorsement does not specifically prohibit a carrier from seeking reimbursement from the listed company. He affirmed that the effect of this endorsement would basically add the listed party as an additional assured under the policy. He conceded that the language in this policy's "Waiver of Our Right to Recover from Others," the waiver of subrogation, did not specifically mention tort liability, debt liability, or reimbursement claims. However, he maintained that the phrase, "liability for any injury" referred to tort liability. He added that this phrase did not specifically include or exclude workers' compensation benefits. Mr. Young also stated that this endorsement was located within the workers' compensation section of the policy. When asked whether these factors would indicate that the carrier waived liability for any payments made in the workers' compensation portion of the policy, Mr. Young stated that, at most, the clause was ambiguous in its wording. TR. 72-84.

Mr. Young testified on redirect that it was logical for Claimant to have voluntarily paid benefits to the injured employee until there was a determination that Respondent was the borrowing employer. He reiterated, in response to his earlier comparison of a waiver of subrogation to a "tort" setting, that he meant the waiver endorsement would apply in the context of a negligence claim as opposed to a claim for compensation. He also explained that the reason the waiver of subrogation appears in the compensation policy section is that without it, the compensation carrier could not be prevented from intervening in a tort case and asking for reimbursement from the third party. He added that, in his experience, the waiver of subrogation endorsement has not been used to prevent reimbursement. Mr. Young defined reimbursement as a situation in which one compensation carrier seeks money that it paid for compensation to be repaid by another employer entity. TR. 86-93.

II. OTHER EVIDENCE

Court Documents

On June 10, 1994, a complaint was filed by John Plaisance, Sr., the injured employee, in the United States District Court for the Eastern District of Louisiana. RX-1, p. 1. This complaint consisted of allegations that Mr. Plaisance was injured during his employment aboard a vessel, and that the vessel's negligence caused his injuries. RX-1, p. 1. Mr. Plaisance sought damages arising from this negligence under section 905(b) of the Longshore Harbor Workers' Compensation Act (LHWCA). Both Respondent and Melancon's Welding were listed as defendants in the action. With reference to Respondent, Mr. Plaisance claimed that his injuries were caused by Respondent's carelessness in maintaining the vessel he was working on at the time he was injured. RX-1, p. 5.

Respondent filed a Motion for Summary Judgment in the civil action, alleging that Mr. Plaisance was its borrowed servant, and, as a result, he had no cause of action. RX-2, p. 1. In support of this motion, Respondent filed a memorandum with the court. RX-2, p. 5. In this memorandum, Respondent used the nine-factor test, employed by the Fifth Circuit, to argue that it was the borrowing employer. RX-2, p. 6-7. Respondent first emphasized that Mr. Plaisance was fully supervised and controlled by its foreman. RX-2, p. 8. Respondent argued that its work, and no other employer's, was being performed at the time of the injury. See Id. Respondent conceded to an express contractual agreement that Melancon's employees were not borrowed servants, but cited cases holding

that the existence of a contract is merely a neutral factor in the borrowed servant analysis. RX-2, p. 8-9.

Respondent also argued that Mr. Plaisance acquiesced to the new job and working conditions. RX-2, p. 9-10. He was also under the full control of Respondent at all times. See Id. In support of this point, Respondent noted that it both directed Mr. Plaisance's actions and had the ability to terminate his employment from the project. See Id. Respondent also argued that it furnished Mr. Plaisance with his tools and place of performance. Additionally, Mr. Plaisance was with Respondent for two weeks before the injury occurred, which Respondent argued was a considerable length of time. RX-2, p. 10. As far as compensation, Respondent conceded that Melancon's Welding was Mr. Plaisance's direct payroll employer. RX-2, p. 11. However, Respondent asserted that since Melancon's Welding received the funds to pay Mr. Plaisance from Respondent, the compensation factor weighed in favor of borrowed servant status. See Id.

On November 16, 1995, the United States District Court granted Respondent's motion on the grounds that Respondent was Mr. Plaisance's "borrowing employer" and, therefore, protected from suit. RX-3.

Contract

The Master Work Contract between Melancon's Welding and Respondent was entered into evidence as RX-5. This contract provides, in relevant part, that Melancon's Welding is required to carry certain types of insurance. This includes workers' compensation and general liability policies. RX-5, p. 2. Melancon's Welding is also required to present a certificate of insurance to Respondent. RX-5, p. 2, 7-10. The contract contains an indemnification section stating that Melancon's Welding will indemnify and hold Respondent harmless for claims or suits for damages to person in connection with either the work performed or the activities of its employees on Respondent's premises. RX-5, p. 3. This indemnification is to apply regardless of whether or not Respondent is negligent. See Id. Section Nine of the contract states that Melancon's Welding has the authority to control and direct the performance of the work. RX-5, p. 3. It also states that Melancon's employees are not to be considered employees of Respondent for any purposes, and that Melancon's Welding must reimburse Respondent for contributions made under employment compensation laws. See Id. Section Nine also includes a provision stating that Melancon is responsible for furnishing its tools. See Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and the arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied,

because it is held to violate Section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

I. BORROWING EMPLOYER STATUS

Claimant first contends that Mr. Plaisance was a borrowed servant, and Respondent is liable, as a borrowing employer, for compensation benefits paid to Mr. Plaisance. Under the borrowed servant doctrine:

> [o]ne may be in the general service of another and still may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person *with all the legal consequences of the new relation*. Standard Oil Co. v. Anderson, 212 U.S. 215, 220, 29 S.Ct. 252, 253, 53 L.Ed. 480 (1909)(emphasis added).

If an employer qualifies as a "borrowing employer," it is liable for the compensation benefits of its borrowed servant under the LHWCA. Champagne v. Penrod Drilling Co., 341 F.Supp. 1282, 1283 (W.D.La. 1971), aff'd, 459 F.2d 1042 (5th Cir. 1972), modified on other grounds, 462 F.2d 1372 (1972). Additionally, in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to reimburse an injured worker's primary employer for any compensation already paid to the injured employee. Total Marine Services, Inc. v. Director, OWCP, 87 F.3d 774 (5th Cir. 1996).

Since this case arises under the jurisdiction of the Fifth Circuit, this Court will use the nine factor test articulated in Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969), in order to determine whether Respondent is a borrowing employer. Nine factors are considered in making this determination. First, the employer should exercise a sufficient degree of control over the employee. Ruiz, 413 F.2d at 312 (5th Cir. 1969). Although no single factor is determinative of "borrowing employer" status, heavy emphasis is placed on this factor. See Hebron v. Union Oil Co. of Ca, 634 F.2d 245 (5th Cir. 1982). The employee should also acquiesce to the new employer, and there should be a temporary termination by the primary employer of its relationship with the employee. Ruiz, 413 F.2d at 313. The remaining factors considered are the furnishing by the borrowing employer of the necessary instruments and place of performance for the work, a considerable period of employment with the employer, the fact that the work being performed is the borrowing employer's, the employer's right to discharge the servant, and its obligation for payment of his wages. Id. at 313. Although a formal agreement between the two employers, direct and borrowing, is not required, there should be some type of meeting of the minds between the two. Ruiz, 413 F.2d at 313. However, when the remaining factors weigh in favor of borrowed servant status, the existence of an agreement is considered a neutral one. Billizon v. Conoco, Inc., 993 F.2d 104, 106 (5th Cir. 1993). As a result, a court may look at what actually occurred in the work place and not strictly at the contractual language in determining borrowed servant status. See Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977).

After examining the factors present in this case, the Court finds Respondent to be Mr. Plaisance's borrowing employer. A majority of the factors present in this case weigh in favor of this status. First, the evidence shows that Respondent exercised a sufficient amount of control over Mr. Plaisance. Mr. Plaisance took instructions solely from Respondent's foreman, Harold Guidry. RX-2, p. 8. Mr. Plaisance also worked at Respondent's facility. Therefore, this Court concludes that these activities are a sufficient exercise of control. This Court also finds that Mr. Plaisance acquiesced to the employment assignment. First, he worked on Respondent's vessel for approximately two weeks before he was injured. Second, there is no evidence to show that he ever attempted to transfer from Respondent's vessel or requested another work assignment. RX-2, p. 17. This Court also finds that the work being performed was Respondent's, because the Master Contract expressly states that the work was being performed on behalf of Respondent at its ship yard. RX-2, p. 10.

This Court also finds that, in light of the control exercised over Mr. Plaisance, a two-week period of employment is sufficient to confer borrowed servant status. He worked on the M/V Gulf Lightening for two weeks before he was injured. See RX-2, p. 39. After his injury, he worked five additional weeks at Respondent's facility. See RX-2, p. 39. During that period he took orders from Respondent and worked at Respondent's facility. See RX-2, p. 15-16. Therefore, this Court finds that two weeks is a sufficient period of time for Mr. Plaisance to become Respondent's borrowed servant. Additionally, the payment obligation factor is met in this case. Although Melancon's Welding was Mr. Plaisance's direct payroll employer, Melancon's Welding was required to keep payroll records for labor paid under the Master Work Contract. See RX-5, p. 2. This Court finds it likely that least some of the funds paid to Melancon's Welding under the contract were used, although indirectly, to pay Mr. Plaisance's wages. Therefore, Melancon's role as direct payroll employer for Mr. Plaisance does not negate borrowed servant status.

In addition, the connection between Melancon's Welding and Mr. Plaisance was sufficiently attenuated to confer borrowed servant status. Although Melancon's Welding did not completely sever its relationship with Mr. Plaisance, this Court finds that Respondent's sole exercise of control over him during the project was enough to attenuate the relationship with his primary employer.

As for the factor of providing the tools and equipment for the job, it is not clear from the evidence whether Mr. Plaisance or Respondent supplied the majority of the equipment for the work. However, since the work was to be performed at Respondent's shipyard, it is logical that at least some of the equipment was supplied by Respondent. This is supported by Section D of the Master Contract, indicating that Respondent intended to supply at least some of the equipment used in repairing the M/V Gulf Lightening. RX-5, p. 4. Therefore, this factor, even assuming that Mr. Plaisance supplied some of his own tools, does not negate borrowed servant status.

Respondent's primary claim is that the contract between the two employers prevents a finding of borrowed servant status. This Court does not agree. The Master Work Contract for the project states that:

> Contractor [Melancon's Welding] specifically agrees that all persons employed by subcontractor in performing work covered by this Contract, or by Contractor's subcontractors, are not the employees of Bollinger [Respondent] for any purpose

whatsoever...RX-5, p. 3.

Although the agreement states that there is no employer/employee relationship between Respondent and Mr. Plaisance, this Court finds that the agreement is not entitled to determinative weight in the borrowed servant analysis. Instead, this Court will look beyond the contractual statements to what actually happened during the project. The interactions between Respondent and Mr. Plaisance indicate an employer/employee relationship, because Mr. Plaisance took orders and instructions from Respondent's foreman. RX-2, p. 15-16. There is no evidence to indicate that Mr. Plaisance was under the supervision of anyone from Melancon's Welding, his primary employer. This exercise of control over Mr. Plaisance contradicts the wording in the contract. Therefore, this Court will give determinative weight to Respondent's actions in exercising control over Melancon's employees, as opposed to the mere wording in the Master Work Contract.

After considering all of the evidence in the record, this Court finds substantial evidence to show that Mr. Plaisance was Respondent's borrowed servant. Conversely, Respondent was Mr. Plaisance's borrowing employer. The majority of the nine factors, as well as the primary factor of control, weigh in favor of this status. As the borrowing employer, Respondent took on the legal obligations and protections of a primary employer. In the federal suit, this designation afforded Respondent the protections from tort liability under the LHWCA. In the present claim for reimbursement, however, Respondent is liable for compensation already paid by Claimant to Mr. Plaisance pursuant to Total Marine Services v. OWCP, 87 F.3d 774 (5th Cir. 1996), unless this Court finds a valid and enforceable indemnification agreement.

II. ENTITLEMENT TO REIMBURSEMENT

Claimant, the primary employer's insurance carrier, asserts that if Respondent is Mr. Plaisance's borrowing employer, it is entitled to reimbursement from Respondent for benefits paid to Mr. Plaisance. First, this Court notes that it has jurisdiction to resolve contractual indemnity and insurance issues between the lending employer, its insurer, and the borrowing employer. See Ricks v. Temporary Employment Services, 33 BRBS 81 (1999). Second, since Respondent has been found to be Mr. Plaisance's borrowing employer by this Court, its liability for reimbursement will be determined using this designation. A borrowing employer is liable for the compensation benefits of its borrowed employee under the LHWCA. Champagne v. Penrod Drilling Co., 462 F.2d 1372 (5th Cir. 1972). In Total Marine Services, 87 F.3d 774, reh'g denied, 99 F.3d 1137 (5th Cir. 1996), the borrowing employer's liability was extended to include reimbursement for compensation already paid to the borrowed servant by the primary employer. Therefore, in the absence of a valid and enforceable indemnification agreement, the borrowing employer is obligated to reimburse the primary employer for any benefits paid by the primary employer to the injured employee. Total Marine Services, Inc. v. Director, OWCP, 87 F.3d at 779. Conversely, the lending employer and its insurer may be ultimately liable to an injured employee under a contract containing an agreement to indemnify the borrowing employer. See Id. at 779.

The lending employer and its carrier may also be ultimately liable to an injured worker under a separate indemnity agreement between the lending and borrowing employers. See Ricks v. Temporary Employment Services, 33 BRBS 81 (1999). Therefore, neither the primary employer nor its insurer is entitled to reimbursement for benefits

paid. See Id.; Schaubert v. Omega Services Industries, 32 BRBS 233 (1998); Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997). The Benefits Review Board reached this conclusion using a two-part analysis. First, the Board examined the contract between the two employers to see if it required one party to carry workers' compensation insurance, as well as an endorsement to waive any and all claims by insurers for injuries covered by the policies. See Schaubert v. Omega Services Industries, 32 BRBS 233 (1998). Second, the Board examined the insurance policy between the primary employer and carrier to see if it contained a liability waiver consistent with the contractual requirements. See Id. For instance, a "Waiver of Our Right to Recover from Others" clause, mentioning the borrowing employer, was sufficient to preclude a primary employer/carrier's right to reimbursement. See Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997). On the other hand, an alternate employer endorsement was not a prerequisite to finding a sufficient waiver of liability. See Id. If the workers' compensation insurance policy contained the waiver, then a valid and enforceable indemnification agreement existed, and neither the primary employer nor its carrier was entitled to reimbursement from the borrowing employer. See Id.

This analysis was used in Schaubert v. Omega Services Industries, 32 BRBS 233 (1998). In Schaubert, the claimant was employed by Omega Services Industries. Id. at 234. Omega contracted with Elf to supply its employees for a project, one of which was the claimant. Id. at 234. Claimant was subsequently injured while working for Elf. Id. at 234. Omega's compensation carrier, INA, voluntarily paid benefits to the claimant. Id. at 234. INA then filed a reimbursement claim against Elf, claiming that Elf was the claimant's borrowing employer. Id. at 234. The Benefits Review Board determined that there was a valid and enforceable indemnification agreement between Elf and Omega. Id. at 239. Therefore, INA was precluded from seeking reimbursement from Elf. Id. at 239.

In the work contract between Omega and Elf, Omega agreed to indemnify Elf for claims made by Omega's employees, resulting from the operations of Omega. Id. at 238. The contract required Omega to carry insurance covering all injuries under the LHWCA, and also required this insurance to be sufficiently endorsed to waive any and all claims by the insurers for injuries under the policies. Id. at 238. In addition, Omega's insurance policy with INA contained a "Waiver of Our Right to Recover from Others" endorsement, which listed blanket coverage in the schedule. Id. at 237-238.

The Board first held that in the Master Work contract between Elf and Omega, Omega specifically agreed to protect Elf from suits and workers' compensation claims filed by Omega employees. Id. at 237. It further held that Elf had a right to rely on that agreement, and by its terms, the contract relieved Elf of liability on the claim by a borrowed Omega employee. Id. at 238. The "Waiver of Our Right to Recover from Others" endorsement in the policy was considered sufficient to protect Elf and consistent with the terms of the Master Work contract. Id. at 238. The fact that INA voluntarily paid claimant benefits was also consistent with the agreement between Elf and Omega. Id. at 238. Therefore, INA, as Omega's carrier, was not entitled to reimbursement from Elf. Id. at 239.

The present case contains a factual scenario similar to the one addressed in the Schaubert case. Therefore, this Court will employ the two-part analysis used in that case to determine whether or not Claimant can bring a reimbursement claim against Respondent. First, in the Master Work Contract, Melancon's Welding did agree to carry workers' compensation to cover its employees. Section Six of the Master Work Contract states:

> Contractor agrees to carry the following insurance throughout the entire period of this Contract:
>
> > a)...Workers' Compensation insurance that complies with the laws of the State of Louisiana, together with an endorsement providing coverage required by the U.S. Longshoremen and Harbor Workers' Act, as amended;
> >
> > d)...Contractor agrees to have Bollinger [Respondent] named as an additional assured.... and....to obtain a waiver of the right of subrogation against Bollinger [Respondent] in the aforementioned Workers' Compensation policy. RX-5, p. 2.

In its brief, Claimant asserted that since Respondent did not expressly require additional assured status for the workers' compensation policy, Respondent only intended to protect itself from tort liability involving Melancon's employees. *See Claimant's Post-Hearing Memorandum*, Case No. 2000-LHC-1082, p. 23. This Court does not agree. First, the Master Work Contract contains an indemnity clause specifically addressing workers' compensation claims. See RX-5, p. 3. Second, even Claimant's expert testified that an employer could not expressly be named as an additional assured in a workers' compensation policy, unless it had an ownership interest in the insured's company. See TR. 44. Given this evidence, it is logical that Respondent would not expressly require additional assured language in the workers' compensation policy.

However, when the above clauses in the Master Work contract are considered together with the indemnity language in the contract, it is evident to this Court that Respondent intended to be sufficiently protected from claims involving Melancon's employees. The indemnity language in the contract expressly requires Melancon's Welding to indemnify and hold Respondent harmless for:

> ...any and all claims, demands, or suits for damages to persons and/or property (including but not limited to claims, demands, or suits for bodily injuries, illness, disease...which may be brought against Bollinger (including but not limited to those brought by Contractor's [Melancon's] employees and agents, and the agents and employees of its subcontractors). RX-5, p. 3.

This Court finds, from examining these clauses, that Melancon's Welding was required to carry insurance covering all injuries under the LHWCA. This insurance was to be sufficiently endorsed, including a waiver of subrogation, to waive any and all claims by the underwriters or insurers for injuries covered by the policy. See RX-5, p. 3. Additionally, Melancon's Welding was required to give a Certificate of Insurance to Respondent, stating that Melancon had workers' compensation insurance under the LHWCA along with a blanket waiver of subrogation. See RX-5, p. 8. Therefore, this Court finds that Melancon's Welding did agree to indemnify Respondent from any claims made against it. Additionally, it was required by contract to obtain an insurance policy that waived all claims against Respondent for workers' compensation claims. Therefore, this Court finds that the Master Work contract constituted a valid and enforceable indemnification agreement between Melancon's Welding and Respondent.

Next, this Court must examine the insurance policy procured by Melancon's Welding to discern whether or not Claimant, the carrier, is entitled to reimbursement. Melancon's insurance policy with Claimant contained a

"Waiver of Our Right to Recover from Others" endorsement. This endorsement states:

> We have the right to recover from anyone *liable for an injury* covered by this policy. We will not enforce our right against the person or organization named in the Schedule. This
>
> agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us. RX-6, p.24. (emphasis added).

Respondent was named in the schedule. Mr. Young, Claimant's expert, testified that this clause would only operate to protect Respondent in a tort setting. However, its language is not expressly limited in application to tort situations. In addition, the clause was placed in the workers' compensation area of the policy. While this Court found Mr. Young's testimony generally credible, even he conceded that the language and placement of this endorsement was ambiguous as applied to reimbursement claims. See TR. 84.

Mr. Young also stated that the alternate employer endorsement would be the correct endorsement to protect Respondent. See TR. 46. He opined that, since there was no endorsement in a policy, Respondent was not protected from reimbursement claims. See TR. 46. However, this Court places determinative weight on the language and endorsements actually contained in the policy. The relevant endorsement is the "Waiver of Right to Recover from Others." The plain language of this waiver states that Claimant has the right to recover from any entity liable for an injury. The waiver is applicable to this reimbursement claim, through its provision, because Respondent required this protection under the Master Work Contract. As a borrowing employer, this clause applies to Respondent, because it would ordinarily be liable for compensating its borrowed employees for injuries. Respondent was expressly named in the schedule as an entity protected from claims brought by Claimant. Therefore, Claimant, as well as Melancon's Welding, is precluded from bringing a suit against Respondent for reimbursement.

The express language in the contract required Melancon to indemnify and hold Respondent harmless for obligations stemming from Melancon's injured employees. In addition, Melancon was required to procure a sufficient endorsement to further protect Respondent from suits by other parties. This Court finds that the "Waiver of Our Right to Recover from Others," expressly listing Respondent in the schedule, was intended to give Respondent the protection agreed upon in the Master Work Contract. This Court also finds that Respondent had a right to rely on its agreement with Melancon's Welding to protect it from suits by both Melancon and Claimant. Since this Court finds sufficient evidence in the record of a valid and enforceable agreement holding Respondent harmless for Melancon employees' compensation claims, Claimant cannot recover its voluntarily paid expenses from Respondent.

CONCLUSION

This Court finds substantial evidence showing that Respondent is the borrowing employer of Mr. Plaisance. As such, Respondent is liable for his compensation unless a valid and enforceable indemnification agreement exists. In this case, such an agreement does exist. After considering both the contract and the insurance policy together, this Court finds that the "Waiver of Our Right to Recover" endorsement precludes any claim for reimbursement by Claimant against Respondent.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that the claim for reimbursement herein is **DENIED**:

A

JAMES W. KERR, JR.
Administrative Law Judge

JWK/sls